

**FEDERAL ELECTION COMMISSION**  
**999 E Street, NW**  
**Washington, DC 20463**

**FIRST GENERAL COUNSEL'S REPORT**

MUR: 7083

DATE COMPLAINT FILED: June 13, 2016<sup>1</sup>

DATE OF NOTIFICATION: June 20, 2016

DATE OF LAST RESPONSE: December 30, 2016

DATE ACTIVATED: January 10, 2017

EXPIRATION OF STATUTE OF LIMITATIONS:

Earliest: June 9, 2021

Latest: July 15, 2021

ELECTION CYCLE: 2016

**COMPLAINANT:** Daniel John Tarkanian

**RESPONDENTS:** Ending Spending, Inc. and Nancy Watkins  
in her official capacity as treasurer

**RELEVANT STATUTES:** 52 U.S.C. § 30104(b), (c)  
11 C.F.R. § 109.10

**INTERNAL REPORTS CHECKED:** Disclosure Reports; Commission Indices

**FEDERAL AGENCIES CHECKED:** None

**I. INTRODUCTION**

In June 2016, Ending Spending, Inc. ("ESI") made almost \$1.6 million in independent expenditures. Because the organization disclosed no contributions for those expenditures in reports filed with the Federal Election Commission ("Commission"), the Complaint in this matter alleges that ESI violated 52 U.S.C. § 30104(c)(1), (b)(3)(A) and 11 C.F.R. § 109.10(e)(1)(iv).<sup>2</sup> In response, ESI argues that it was not required to disclose any contributions

<sup>1</sup> On June 17, 2016, Complainant notified this Office that he was withdrawing the Complaint. See Letter from Daniel John Tarkanian to the Office of General Counsel, dated June 17, 2016. In response, this Office advised Complainant that a request for withdrawal does not prevent the Commission from taking appropriate action under the Act. See Letter from Complaint, Examination & Legal Administration to Tarkanian, dated June 24, 2016.

<sup>2</sup> Compl. at 1 (June 13, 2016).

1 for the independent expenditures at issue because no contributions were made to or received by  
2 ESI for the purpose of furthering the reported independent expenditures.<sup>3</sup>

3 As discussed below, the factual record contains no information indicating that ESI  
4 received contributions for the purpose of furthering a particular communication. We therefore  
5 recommend that the Commission find no reason to believe that Ending Spending, Inc. and Nancy  
6 Watkins in her official capacity as treasurer violated 52 U.S.C. § 30104(c)(2) and 11 C.F.R.  
7 § 109.10(e)(1)(vi). Further, to the extent that a question is presented as to whether ESI violated  
8 52 U.S.C. § 30104(c)(1), separate and apart from its disclosure obligation under subsection  
9 (c)(2), we recommend that the Commission exercise its prosecutorial discretion and dismiss this  
10 allegation.<sup>4</sup>

## 11 II. FACTUAL BACKGROUND

12 ESI is a non-profit organization established in 2010 under section 501(c)(4) of the  
13 Internal Revenue Code.<sup>5</sup> Nancy Watkins serves as treasurer of ESI. According to the Response,  
14 ESI spends most of its resources advocating for public policies that “increase government  
15 transparency and accountability and promote fiscal discipline.”<sup>6</sup> ESI contends that it  
16 periodically spends “smaller portions of its general treasury funds” on political communications  
17 that advocate for or against a political candidate. ESI asserts that it has a “longstanding policy

<sup>3</sup> Resp. at 3 (Dec. 30, 2016).

<sup>4</sup> See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

<sup>5</sup> Resp. at 2. ESI was formed as a Virginia corporation on March 22, 2010. See Commonwealth of Va., State Corp. Comm’n, <https://sccefile.scc.virginia.gov/Business/0720884> (last visited March 10, 2017). In 2011, ESI changed its name from “Taxpayers Against Earmarks” to ESI and was granted tax-exempt status on March 29, 2011. Resp. Ex. B. ESI has not posted federal tax returns for 2015 and 2016, so we do not know what percentage of its revenue was spent on political communications. In addition, ESI’s website is under construction, and we have no information on how ESI conducts its fundraising and solicitations.

<sup>6</sup> Resp. at 2.

1 not to accept any earmarked contributions designated for a particular purpose, communication, or  
2 candidate,” and ESI alone determines how to disburse funds.<sup>7</sup> ESI has not disclosed any  
3 contributions in independent expenditure reports filed with the Commission.<sup>8</sup>

4 In the period leading up to the June 14, 2016, Republican primary election in Nevada,  
5 ESI filed three 24-hour independent expenditures reports disclosing \$1,618,141 in expenditures:  
6 June 9th (\$1,565,530), June 12th (\$42,061.20), and June 13th (\$10,549.80). ESI also filed a  
7 2016 July Quarterly Report disclosing \$1,618,141 in expenditures.<sup>9</sup> On September 15, 2016, the  
8 Reports Analysis Division (“RAD”) sent ESI a Request for Additional Information (“RAFI”)   
9 with respect to missing contributor information in its 2016 July Quarterly Report.<sup>10</sup> In response,  
10 ESI stated that it “did not receive any contribution to further the independent expenditures  
11 disclosed on the report” and thus “no contributors are disclosed on Line 7 and no amendment of  
12 the report is necessary.”<sup>11</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> See 2013 Year-End Report (\$177,960.81), 2014 Year-End Report (\$4,025,874.68), 2016 July Quarterly (\$1,618,141.00); and 2016 Year-End (\$1,018,222.67). ESI also did not disclose contributions in its Electioneering Communication notices filed with the Commission in 2012 (\$515,000) and 2014 (\$1,105,537.35). According to information provided by the Office of the Chief Information Officer, the vast majority of independent expenditure filers, 167 out of 227 independent expenditure filers (or 74% of such filers), do not disclose any contributions for their independent expenditures.

<sup>9</sup> Complainant was a candidate in the 2016 Republican primary in Nevada’s Third Congressional District. The independent expenditures were for communications that opposed Complainant or supported his opponent in the primary race. Resp. at 2.

<sup>10</sup> See RAFI from Reports Analysis Division to ESI, dated Sept. 15, 2016.

<sup>11</sup> See Miscellaneous Text (FEC Form 99) from ESI to RAD, dated Oct. 18, 2016.

1     **III.     LEGAL ANALYSIS**

2             The Federal Election Campaign Act of 1971, as amended (the "Act") requires persons,  
3     other than political committees, who make independent expenditures<sup>12</sup> that exceed \$250 during a  
4     calendar year to file a report disclosing information about those expenditures and identifying  
5     persons who made a contribution in excess of \$200 in a calendar year.<sup>13</sup> Such a report also must  
6     include, among other information, "the identification of each person who made a contribution in  
7     excess of \$200 to the person filing such statement which was made for the purpose of furthering  
8     an independent expenditure."<sup>14</sup> The Commission's implementing regulation provides that an  
9     independent expenditure report must include "[t]he identification of each person who made a  
10    contribution in excess of \$200 to the person filing such report which contribution was made for  
11    the purpose of furthering *the reported* independent expenditure."<sup>15</sup>

12            This Office previously addressed the scope of disclosure required under section 30104(c)  
13    of the Act and section 109.10(e)(1) of the Commission's implementing regulations in RR 07L-44  
14    (League of Conservation Voters, Inc.) and MUR 6696 (Crossroads Grassroots Policy

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<sup>12</sup>     An independent expenditure is an expenditure that expressly advocates the election or defeat of a clearly identified federal candidate and "that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 52 U.S.C. § 30101(17).

<sup>13</sup>     52 U.S.C. § 30104(c)(1); 11 C.F.R. § 109.10(b).

<sup>14</sup>     52 U.S.C. § 30104(c)(2)(C) (emphasis added).

<sup>15</sup>     11 C.F.R. § 109.10(e)(1)(vi) (emphasis added). In 2011, Rep. Chris Van Hollen petitioned the Commission to revise section 109.10(e)(1)(vi), arguing that it "requires disclosure only of those contributors who state a specific intent to fund a specific ('the reported') independent expenditure." Rep. Chris Van Hollen, Petition for Rulemaking at 3 (Apr. 21, 2011) ("Van Hollen Petition"). In response, this Office submitted to the Commission a draft notice of proposed rulemaking proposing to amend section 109.10(e)(1)(vi). The proposal would have required disclosure of all contributors who make a contribution for the purpose of furthering "an" independent expenditure. *See* Draft Notice of Proposed Rulemaking for Independent Expenditure Reporting at 7 (Dec. 15, 2011) ("Draft Notice"). The Commission did not approve the proposal for publication in the *Federal Register*.

1 Strategies).<sup>16</sup> In both matters, because the factual record contained no information indicating  
2 that respondents received funds for the purpose of furthering the reported expenditures, we  
3 recommended that the Commission not pursue an enforcement action.<sup>17</sup> Further, although we  
4 explained that section 30104(c)(1) may impose additional reporting obligations for certain  
5 contributions made for the purpose of influencing a federal election generally,<sup>18</sup> we noted that  
6 the Commission's regulation at 11 C.F.R. § 109.10(e) was silent as to such a requirement and  
7 may not provide sufficient notice on that separate reporting obligation.<sup>19</sup>

8 Here, the Complaint alleges that ESI violated the disclosure provisions for independent  
9 expenditures under the Act and Commission regulations without providing any specific  
10 information supporting a reasonable inference that a donor made a contribution for the purpose  
11 of furthering a reported expenditure. We are not aware of any such facts. Moreover, ESI  
12 contends that it has a policy of not accepting contributions designated for a particular purpose

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<sup>16</sup> MUR 6696 (Crossroads Grassroots Policy Strategies).

First Gen. Counsel's Rpt. at 1,

<sup>17</sup> ; First GCR at 11-13, MUR 6696.

<sup>18</sup> 52 U.S.C. § 30104(c)(1), formerly 2 U.S.C. § 434(c)(1), may reasonably be construed to require disclosure of the identity of certain contributors regardless of whether a contributor made a contribution to further a specific independent expenditure. See FGCR at 10, MUR 6696;

See FGCR at 10, MUR 6696;

<sup>19</sup>

In MUR 6696, the Commission deadlocked on whether to pursue an enforcement action and voted to close the file, thereby dismissing the complaint. See Certification, MUR 6696 (Crossroads Grassroots Policy Strategies), dated Nov. 17, 2015; Certification in MUR 6696 (Crossroads Grassroots Policy Strategies), dated Dec. 17, 2015. On February 16, 2016, Complainant, Citizens for Responsibility and Ethics in Washington ("CREW") filed suit challenging both the Commission's dismissal of their administrative complaint against Crossroads GPS and individuals connected to the organization and the Commission regulation that requires disclosure only of donors whose contribution was made to further the reported independent expenditure. See *CREW v. FEC*, No. 16-cv-00259 (D.D.C. Feb. 16, 2016). Most recently, the court denied the Commission's partial motion to dismiss the regulatory challenge and partially denied and partially granted a motion by Crossroads GPS that sought to partially dismiss plaintiffs' complaint. Order, *CREW, supra* (Mar. 22, 2017).

1 and denies that it received any contributions that would require the identification of any donor.  
2 Under these circumstances, we recommend that the Commission find no reason to believe that  
3 Ending Spending, Inc. and Nancy Watkins in her official capacity as treasurer violated 52 U.S.C.  
4 § 30104(c)(2) and 11 C.F.R. § 109.10(e)(1)(vi).

5 Finally, as described above, while Section 30104(c)(1) of the Act may impose additional  
6 reporting obligations for contributions made for the purpose of influencing a federal election  
7 generally, the facts do not indicate that ESI violated the reporting requirement under the  
8 Commission's implementing regulation at 11 C.F.R. § 109.10(e)(1)(vi). Because ESI could raise  
9 equitable concerns about whether a filer has fair notice of the requisite level of disclosure  
10 required by law if the Commission attempted to impose liability under Section 30104(c)(1), we  
11 recommend that the Commission dismiss the allegation that ESI violated 52 U.S.C.  
12 § 30104(c)(1) in the exercise of its prosecutorial discretion.<sup>20</sup>

13 **IV. RECOMMENDATIONS**

- 14 1. Find no reason to believe that Ending Spending Inc. and Nancy Watkins in her  
15 official capacity as treasurer violated 52 U.S.C. § 30104(c)(2) and 11 C.F.R.  
16 § 109.10(e)(1)(vi);  
17 2. Dismiss in the exercise of prosecutorial discretion the allegation that Ending  
18 Spending Inc. and Nancy Watkins in her official capacity as treasurer violated  
19 52 U.S.C. § 30104(c)(1);  
20 3. Approve the attached Factual and Legal Analysis;  
21 4. Approve the appropriate letters; and  
22

<sup>20</sup> See *Heckler*, 470 U.S. at 831.

5. Close the file.

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Date: 4.10.17

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